

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ALICE SINANYAN, an individual; JAMES)
KOURY, an individual and trustee of the)
Koury Family Trust; and SEHAK TUNA, an)
individual, on behalf of themselves and others)
similarly situated,)

Case No.: 2:15-cv-00225-GMN-VCF

ORDER

Plaintiffs,
vs.

LUXURY SUITES INTERNATIONAL, LLC,)
a Nevada limited liability company; RE/MAX)
PROPERTIES, LLC, a Nevada limited liability)
company; JETLIVING HOTELS, LLC, a)
Nevada limited liability company; and DOES 1)
through 100, inclusive,)

Defendants.

This action involves claims brought by Alice Sinanyan (“Plaintiff”), individually and on behalf of a putative class of approximately 110 condominium owners, against property rental manager JetLiving Hotels, LLC (“JetLiving”).¹ Plaintiff alleges that JetLiving violated its contractual, statutory, and common law duties by failing to disclose its collection of a “resort fee” from rental guests, and the parties have now reached a settlement. Pending before the Court is the Joint Motion for an Order (ECF No. 69) filed by both parties requesting that the Court grant provisional approval of the proposed settlement agreement and preliminarily certify Plaintiff’s proposed class action for purposes of settlement. For the reasons stated herein, the

¹ There are also two other named plaintiffs—James Koury and Sehak Tuna—who are seeking to represent a class against Defendant Luxury Suites International, LLC (“LSI”). Plaintiff is also seeking to represent the class against LSI and Defendant Jab Affiliates, LLC (“Jab”). Reference to these plaintiffs and codefendants is omitted because the instant Motion only concerns allegations with respect to Plaintiff and JetLiving.

1 Motion is **DENIED**.

2 **I. BACKGROUND**

3 On January 6, 2015, Plaintiff filed the instant action alleging various state law violations
4 on behalf of a putative class comprising all condominium owners at the Signature at MGM
5 Grand (“The Signature”) who contracted with JetLiving to manage the rental of their
6 condominium units after January 5, 2009 (“Putative Class”). (Compl. ¶ 60, ECF No. 1-1).
7 Specifically, Plaintiff alleges that pursuant to the JetLiving Rental Agreement, members of the
8 Putative Class were entitled to 65% of a “resort fee” collected by JetLiving from rental guests.
9 (*Id.* ¶ 55). According to Plaintiff, not only did JetLiving retain all resort fees, JetLiving also
10 failed to disclose that it was collecting the fee. (*Id.* ¶¶ 52, 54, 55). Based on these allegations,
11 the Complaint alleges the following causes of action against JetLiving: (1) breach of contract;
12 (2) breach of implied covenant of good faith and fair dealing; (3) intentional misrepresentation;
13 (4) fraudulent concealment; (5) negligent misrepresentation; (6) violation of Nevada Revised
14 Statutes § 41.600; (7) breach of fiduciary duty; and (8) unjust enrichment.

15 On January 14, 2016, the parties reached a tentative settlement through mediation and
16 subsequently submitted the proposed settlement (“Proposed Settlement”) now before the Court.
17 (*See* Joint Mot. for Order 3:10–12, ECF No. 69). The total settlement amount is \$250,000
18 (“Settlement Amount”), which the parties propose allocating in the following manner: (1)
19 “attorney’s fees not to exceed the amount of one hundred thousand dollars (\$100,000.00)”; (2)
20 “costs not to exceed ten thousand dollars (\$10,000.00)”; (3) “an incentive payment in the
21 amount of ten thousand dollars (\$10,000.00) for plaintiff Alice Sinanyan”; (4) “administrative
22 expenses in the amount of no greater than nine thousand dollars (\$9,000.00)”; and (5) an
23 allocation of the remaining \$121,000 “on a *pro rata* basis based on the total resort fees
24 collected by JetLiving from the rental of the individual Putative Class member’s unit divided
25 by the total resort fees collected by JetLiving from the rental of all non-opt out Putative Class

1 members' units." (*Id.* 3:26–4:3, 4:13–15). The Proposed Settlement provides for notice by
2 direct mail to all Putative Class members identified through JetLiving's business records. (*Id.*
3 16:3–9).

4 The instant Motion requests that the Court adopt the parties' proposed order (1) granting
5 preliminary approval of the proposed class action Proposed Settlement; (2) provisionally
6 certifying the Putative Class; (3) approving the proposed method and form of notice; and (4)
7 scheduling a final approval hearing.

8 **II. LEGAL STANDARD**

9 The Ninth Circuit has declared that a strong judicial policy favors settlement of class
10 actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). However, a
11 class action may not be settled without court approval. Fed. R. Civ. P. 23(e). When the parties
12 to a putative class action reach a settlement agreement prior to class certification, "courts must
13 peruse the proposed compromise to ratify both the propriety of the certification and the fairness
14 of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). At the preliminary
15 stage, the court must first assess whether a class exists. *Id.* (citing *Amchem Prods. Inc. v.*
16 *Windsor*, 521 U.S. 591, 620 (1997)). Second, the court must determine whether the proposed
17 settlement "is fundamentally fair, adequate, and reasonable." *Hanlon v. Chrysler Corp.*, 150
18 F.3d 1011, 1026 (9th Cir. 1998). If the court preliminarily certifies the class and finds the
19 proposed settlement fair to its members, the court schedules a fairness hearing where it will
20 make a final determination as to the fairness of the class settlement. Third, the court must
21 "direct notice in a reasonable manner to all class members who would be bound by the
22 proposal." Fed. R. Civ. P. 23(e)(1).

23 **III. DISCUSSION**

24 The Motion contends, *inter alia*, that the Court should (1) certify the proposed Putative
25 Class and (2) grant preliminary approval of the Proposed Settlement. Because the Proposed

1 Settlement fails to demonstrate the fairness and reasonableness of the proposed allocation for
2 the Settlement Fund, the Court finds the Proposed Settlement deficient. This deficiency causes
3 the Court to disagree that provisional certification is proper at this time.

4 **A. Conditional Class Certification**

5 Plaintiff seeks conditional certification of a settlement class under Rule 23(a) and (b)(3)
6 and satisfies all but one of Rule 23's certification requirements. (*See* Joint Mot. for Order 6:3–
7 20, ECF No. 69). To obtain class certification, a plaintiff must satisfy the four prerequisites
8 identified in Rule 23(a) as well as one of the three subdivisions of Rule 23(b). *Amchem Prods.*,
9 521 U.S. at 614. “The four requirements of Rule 23(a) are commonly referred to as
10 ‘numerosity,’ ‘commonality,’ ‘typicality,’ and ‘adequacy of representation’ (or just
11 ‘adequacy’), respectively.” *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus.*
12 *& Serv. Workers Int’l Union, AFL–CIO v. ConocoPhillips Co.*, 593 F.3d 802, 806 (9th Cir.
13 2010). Certification under Rule 23(b)(3) is appropriate where common questions of law or fact
14 predominate and class resolution is superior to other available methods. Fed. R. Civ. P.
15 23(b)(3). The party seeking class certification bears the burden of affirmatively demonstrating
16 that the class meets Rule 23's requirements. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541,
17 2553 (2011).

18 In general, “[b]efore certifying a class, the trial court must conduct a ‘rigorous analysis’
19 to determine whether the party seeking certification has met the prerequisites of Rule 23.”
20 *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012) (citations omitted).
21 However, when evaluating class certification in the context of a proposed settlement, courts
22 “must pay undiluted, even heightened, attention to class certification requirements” because the
23 court will lack the opportunity, present when a case is litigated, to adjust the class, informed by
24 the proceedings as they unfold. *Hanlon*, 150 F.3d at 1019; *see also Amchem Prods.*, 521 U.S. at
25 620. The Court finds that Plaintiff has met the numerosity, commonality, and typicality

requirements under Rule 23(a) as well as the certification requirements under Rule 23(b). However, because Plaintiff has not demonstrated that her counsel will adequately represent the absent Putative Class members, the Court finds that preliminary certification is not proper.

i. Rule 23(a)

1. Numerosity

Rule 23(a)(1) requires that a class be so numerous that joinder of all members is impracticable. Generally, courts have held that numerosity is satisfied when the class size exceeds forty members. *See, e.g., Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654–56 (C.D. Cal. 2000); *In re Cooper Cos. Inc. Secs. Litig.*, 254 F.R.D. 628, 634 (C.D. Cal. 2009).

In this case, the Putative Class consists of approximately 110 unit owners who contracted with JetLiving for rental management of their units during the relevant period. (Joint Mot. for Order 7:3–4). Therefore, the Court can safely conclude that the Putative Class is sufficiently numerous such that the joinder of each member would be impracticable.

2. Commonality

To demonstrate commonality, a plaintiff must show that there are “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). “A class has sufficient commonality ‘if there are questions of fact and law which are common to the class.’” *Hanlon*, 150 F.3d at 1019. As clarified in *Dukes*, a plaintiff must demonstrate that the class members “have suffered the same injury” and that their claims “depend upon a common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” 131 S. Ct. at 2551.

Here, the Complaint raises several common questions of law and fact, including (1) whether JetLiving failed to disclose the resort fee to the Putative Class and (2) whether JetLiving failed to treat the resort fee as gross rental revenue. (Compl. ¶¶ 52, 54, 55, ECF No.

1 1-1). If Plaintiff continued to press this action, the answers to these questions would result in
2 classwide resolution of the claims asserted. Therefore, the Court finds that Plaintiff has
3 satisfied the commonality requirement.

4 **3. Typicality**

5 To demonstrate typicality, Plaintiff must show that her claims are typical of the class.
6 Fed. R. Civ. P. 23(a)(3). “The test of typicality ‘is whether other members have the same or
7 similar injury, whether the action is based on conduct which is not unique to the named
8 plaintiffs, and whether other class members have been injured by the same course of conduct.’”
9 *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). “Typicality refers to the
10 nature of the claim or defense of the class representative, and not to the specific facts from
11 which it arose or the relief sought.” *Id.*

12 In this case, like the Putative Class, Plaintiff contracted with JetLiving for rental
13 management of her condominium units at The Signature and allegedly failed to receive her
14 portion of a resort fees collected by JetLiving from rental guests. (Compl. ¶¶ 52, 54, 55, 63).
15 Thus, the named Plaintiff’s claims and the nature of her alleged losses are sufficiently similar to
16 the Putative Class’s claims and alleged losses to be considered typical.

17 **4. Adequacy of Representation**

18 “To satisfy constitutional due process concerns, absent class members must be afforded
19 adequate representation before entry of a judgment which binds them.” *Hanlon*, 150 F.3d at
20 1020 (citing *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940)). In *Hanlon*, the Ninth Circuit
21 identified two issues for determining the adequacy of representation: (1) whether the named
22 plaintiffs and their counsel have any conflicts of interest with other class members, and (2)
23 whether the named plaintiffs and their counsel will “prosecute the action vigorously on behalf
24 of the class.” *Id.*

25 In the instant case, the Court is entirely satisfied that the named Plaintiff will adequately

1 represent the Putative Class. However, as explained more fully below, the Court has concerns
2 about the fairness and adequacy of the Proposed Settlement, which prohibit the Court from
3 finding that Plaintiff's counsel ("Counsel") will adequately protect the interests of the Putative
4 Class. Specifically, the Court is concerned about the Proposed Settlement's allocation of
5 attorneys' fees and costs. These defects are cause for hesitation, and until they are cured, the
6 Court is unable to conclude that Counsel will adequately represent the interests of the Putative
7 Class. Accordingly, the Court cannot find that Rule 23(a) is satisfied at this time.

8 **ii. Rule 23(b)**

9 Rule 23(b)(3) permits certification where "the court finds that questions of law or fact
10 common to the members of the class predominate over any questions affecting only individual
11 members, and that a class action is superior to other available methods for the fair and efficient
12 adjudication of the controversy" in light of, among other things, "the difficulties likely to be
13 encountered in the management of a class action." Fed. R. Civ. P. 23(b)(3).

14 This case satisfies Rule 23(b)(3)'s requirements. The common questions of whether
15 Plaintiff and the Putative Class were entitled to a share of the resort fee and whether JetLiving
16 had a duty to disclose that it was collecting resort fees predominate over any individual
17 questions. Moreover, adjudicating this matter as a class action is a superior approach to
18 resolving the instant controversy because it avoids the dangers of duplicative litigation and the
19 unfairness of inconsistent judgments.

20 **B. Preliminary Approval of the Proposed Settlement**

21 The Court next considers whether the terms of the Proposed Settlement are fair,
22 reasonable, and adequate towards the absent Putative Class members. *See* Fed. R. Civ. P.
23 23(e)(2). Courts have long recognized that "settlement class actions present unique due process
24 concerns for absent class members." *Hanlon*, 150 F.3d at 1026. One inherent risk is that class
25 counsel may collude with the defendants, "tacitly reducing the overall settlement in return for a

1 higher attorney's fee." *Knisley v. Network Assocs., Inc.*, 312 F.3d 1123, 1125 (9th Cir. 2002);
2 *see Evans v. Jeff D.*, 475 U.S. 717, 733 (1986) (recognizing that "the possibility of a tradeoff
3 between merits relief and attorneys' fees" is often implicit in class action settlement
4 negotiations).

5 To guard against this potential for class action abuse, Rule 23(e) requires court approval
6 of all class action settlements, which may be granted only after a fairness hearing and a
7 determination that the settlement taken as a whole is fair, reasonable, and adequate. Fed. R.
8 Civ. P. 23(e)(2); *see Staton*, 327 F.3d at 972 n. 22 (noting that the court's role is to police the
9 "inherent tensions among class representation, defendant's interests in minimizing the cost of
10 the total settlement package, and class counsel's interest in fees"); *Hanlon*, 150 F.3d at 1026
11 ("It is the settlement taken as a whole, rather than the individual component parts, that must be
12 examined for overall fairness.").

13 The factors in a court's fairness assessment will naturally vary from case to case, but
14 courts in the Ninth Circuit generally must weigh the *Churchill* factors:

15 (1) the strength of the plaintiff's case; (2) the risk, expense,
16 complexity, and likely duration of further litigation; (3) the risk of
17 maintaining class action status throughout the trial; (4) the amount
18 offered in settlement; (5) the extent of discovery completed and the
19 stage of the proceedings; (6) the experience and views of counsel;
(7) the presence of a governmental participant; and (8) the reaction
of the class members of the proposed settlement.

20 *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (quoting
21 *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)). However, where, as
22 here, "a settlement agreement is negotiated *prior* to formal class certification, consideration of
23 these eight *Churchill* factors alone is not enough." *Id.*

24 Prior to formal class certification, there is an even greater potential for a breach of
25 fiduciary duty owed the class during settlement. Accordingly, "such agreements must

withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court’s approval as fair.” *Id.* (citing *Hanlon*, 150 F.3d at 1026); accord *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 805 (3d Cir. 1995) (cautioning that courts must be “even more scrupulous than usual in approving settlements where no class has yet been formally certified”); *Mars Steel Corp. v. Cont’l Ill. Nat’l Bank & Trust Co. of Chicago*, 834 F.2d 677, 681 (7th Cir. 1987) (“[W]hen class certification is deferred, a more careful scrutiny of the fairness of the settlement is required.”); *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (noting that reviewing courts must employ “even more than the usual care”); see also *Manual for Complex Litig.* § 21.612 (4th ed. 2004). Therefore, before approving a precertification settlement, the Court must not only show that it “has explored [the *Churchill*] factors comprehensively, but also that the settlement is not the product of collusion among the negotiating parties.” *In re Bluetooth*, 654 F.3d at 947.

Because collusion is unlikely to be evident from the face of the settlement itself, “courts must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations.” *Id.* A few such signs include: (1) “when counsel receive a disproportionate distribution of the settlement”; (2) “when the parties negotiate a ‘clear sailing’ arrangement providing for the payment of attorneys’ fees separate and apart from class funds”; and (3) “when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund.” *In re Bluetooth*, 654 F.3d at 947.

i. Proposed Class Members’ Share of the Settlement

Under the Proposed Settlement, the amount to be paid to the entire Putative Class will not exceed 48.4% of the total Settlement Amount, which itself represents roughly 19.4% of the

1 Putative Class's maximum estimated damages.² (*See* Joint Mot. for Order 3:24–4:4, 13:1–2).
2 The parties have failed to demonstrate that this allocation reflects a fair result for the Putative
3 Class.

4 Indeed, the parties propose using \$119,000, or 47.6%, of the award for legal fees, costs,
5 and administrative expenses. (*See id.*). This figure represents a fee award of 40% of the
6 \$250,000 Settlement Amount. Another \$10,000 is allocated towards an incentive payment for
7 Plaintiff. From here, simple arithmetic reveals that the parties have proposed an agreement
8 under which the absent Putative Class members will receive no more than 48.4% of the funds
9 offered in exchange for their claims. This alone is cause for hesitation, and the parties have
10 made no effort to persuade the Court that it is a fair or reasonable result. The Court will not
11 approve a precertification settlement without justification of the proposed allocation of
12 settlement funds. Therefore, to obtain the Court's approval, the parties must justify these
13 allocations and thereby show that the proposed 48.4% left for the Putative Class represents a
14 fundamentally fair, adequate, and reasonable result.

15 **ii. *Proposed Award of Attorneys' Fees***

16 The Court recognizes that it need not directly address a proposed allocation of attorneys'
17 fees until the settlement becomes final. However, the parties must, to some degree, justify the
18 proposed award at this stage because any award of fees will directly reduce the amount payable
19 to the Putative Class, and thus bears on the present fairness inquiry. *Martinez v. Realogy Corp.*,
20 No. 3:10-cv-00755-RCJ-VPC, 2013 WL 5883618, at *6 (D. Nev. Oct. 30, 2013).

21 This is a common fund case. (Joint Mot. for Order 3:19). Under regular common fund
22 procedure, the parties settle for the total amount of the common fund and shift the fund to the
23 court's supervision. The plaintiffs' lawyers then apply to the court for a fee award from the
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25 ² The parties agree that if Plaintiff's allegations are true, "then each unit owner would be entitled to . . . \$624,000." (Joint Mot. for Order 13:1–2). However, "the parties negotiated a settlement of \$250,000." (*Id.* 13:2–3).

1 fund. *See Paul, Johnson, Alston & Hunt v. Gaulty*, 886 F.2d 268, 271 (9th Cir. 1989) (noting
2 that in a common fund case, “a court has control over the fund—even one created pursuant to a
3 settlement, as here[—] . . . and assesses the litigation expenses against the entire fund so that
4 the burden is spread proportionally among those who have benefited.”). In setting the amount
5 of common fund fees, the district court has a special duty to protect the interests of the class.
6 On this issue, the class’s lawyers occupy a position adversarial to the interests of their clients.
7 *Staton*, 327 F.3d at 970. As the Ninth Circuit has explained,

8 [b]ecause in common fund cases the relationship between plaintiffs
9 and their attorneys turns adversarial at the fee-setting stage, courts
10 have stressed that when awarding attorneys’ fees from a common
11 fund, the district court must assume the role of fiduciary for the class
12 plaintiffs. Accordingly, fee applications must be closely scrutinized.
Rubber-stamp approval, even in the absence of objections, is improper.

13 *Id.* (emphasis added); *see also In re Coordinated Pre-trial Proceedings in Petroleum Prods.*
14 *Antitrust Litig.*, 109 F.3d 602, 608 (9th Cir. 1997) (“In a common fund case, the judge must
15 look out for the interests of the beneficiaries, to make sure that they obtain sufficient financial
16 benefit after the lawyers are paid. Their interests are not represented in the fee award
17 proceedings by the lawyers seeking fees from the common fund.”).

18 An award of attorney fees for creating a common fund may be calculated in one of two
19 ways: (1) a percentage of the funds created; or (2) “the lodestar method, which calculates the
20 fee award by multiplying the number of hours reasonably spent by a reasonable hourly rate and
21 then enhancing that figure, if necessary, to account for the risks associated with the
22 representation.” *Gaulty*, 886 F.2d at 272. The Ninth Circuit has approved either method for
23 determining a reasonable award of fees. *Id.* However, the fee award must always be reasonable
24 under the circumstances. *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1296
25 (9th Cir. 1994).

1 The typical range of acceptable attorney fees in the Ninth Circuit is 20% to 30% of the
2 total settlement value, with 25% considered a benchmark percentage. *Vizcaino v. Microsoft*
3 *Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002); *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir.
4 2000). In assessing whether the percentage requested is fair and reasonable, courts generally
5 consider the following factors: (1) the results achieved; (2) the risk of litigation; (3) the skill
6 required; (4) the quality of work performed; (5) the contingent nature of the fee and the
7 financial burden; and (6) the awards made in similar cases. *Vizcaino*, 290 F.3d at 1047–50. In
8 circumstances where a percentage recovery would be too small or too large in light of the hours
9 worked or other relevant factors, the “benchmark percentage should be adjusted, or replaced by
10 a lodestar calculation.” *Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993).

11 Here, Plaintiff has not provided a basis for concluding that the proposed fee award is
12 reasonable. Instead, Counsel states that it “will seek to recover an amount not to exceed
13 \$100,000 . . . for attorney’s fees.” (Joint Mot. for Order 17:13–14, ECF No. 69). At this stage,
14 the Court assumes that Counsel expects the full amount requested—\$100,000, or 40% of the
15 Settlement Amount. If that is the case, Counsel must make a strong showing under the
16 *Vizcaino* factors, because an award of 40% is higher than the acceptable maximum of 30% and
17 a full 19% higher than the Ninth Circuit’s “bench mark.” Alternatively, Counsel could rely on
18 the lodestar method as a basis for the proposed fee. Again, however, Counsel would be
19 required to show that the Proposed Settlement can support the multiplier necessary to yield a
20 fee of \$100,000. In either case, prior to a grant of precertification approval, Counsel must
21 clearly articulate and justify its proposed award. Because Counsel makes no showing of
22 entitlement to the fees requested under either the relevant factors or a lodestar calculation, the
23 Court cannot find that the Proposed Settlement is fair and reasonable.

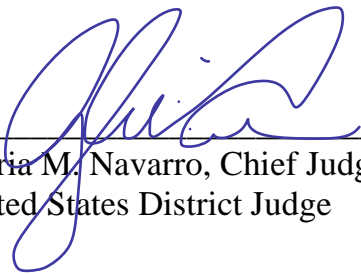
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1 **IV. CONCLUSION**

2 **IT IS HEREBY ORDERED** that Plaintiff's Motion for Order (ECF No. 69) is
3 **DENIED.**

4 **DATED** this 18 day of April, 2016.

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7 Gloria M. Navarro, Chief Judge
8 United States District Judge
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